

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHRISTOPHER N. BILYNSKY,)	
)	
Petitioner,)	
)	
v.)	No. 4:00 CV 953 ERW
)	DDN
JANET SCHNEIDER,)	
)	
Respondent.)	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before upon the petitioner of Christopher Bilynsky for a federal writ of habeas corpus. The matter was referred to the undersigned United States Magistrate Judge for review and recommended disposition in accordance with 28 U.S.C. § 636(b).

I. BACKGROUND

On November 4, 1996, Bilynsky pled guilty in the Circuit Court of St. Louis County (Circuit Court) to possession with intent to deliver a controlled substance (marijuana), a Class B felony. He was sentenced to five years imprisonment, but execution of this sentence was suspended; he was placed on probation for three years under the standard conditions of probation and certain special conditions.¹ The special conditions included thirty days of "shock" incarceration to begin on January 21, 1997, and participation in a work release program in Virginia. Bilynsky's probation supervision was to be

¹Bilynsky filed a 28 U.S.C. § 2254 petition with respect to this conviction. That petition was filed in the United States District Court for the Western District of Missouri on June 3, 1999, transferred to the United States District Court for the Eastern District of Missouri, and filed-stamped again on August 10, 1999. District Judge E. Richard Webber denied the petition See Bilynsky v. Taylor, 4:99CV1239ERW (E.D. Mo. Sept. 26, 2002).

transferred to the State of Virginia, his state of residence. (Resp. Ex. C.)

On June 3, 1997, respondent filed a probation revocation request with the Circuit Court, which then filed a revocation hearing notice, advising that Bilynsky was being charged with violating "Condition #1-LAWS: by being arrested for forcible rape and assault and battery."² A copy of the notice was sent to Bilynski's attorney. The Circuit Court issued an arrest warrant, which was returned executed on October 9. (Id.)

Bilynsky, represented by counsel, appeared before the same Circuit Court on October 23, 1997. The following colloquy occurred between the court and Bilynski.

Q [Court]: Did you understand when you signed this form that you were in fact waiving your right to a hearing in this matter; that is, giving up your right to a hearing and that you were admitting that you violated Condition No. 1 of the probation as alleged in the probation violation report dated May 2, 1997 and filed with this Court?

A [Bilynsky]: Yes, sir.

Q: And you have gone over that report, is that correct?

A: Yes, sir.

Q: The Court herewith accepts the Defendant's waiver, and based upon admissions of the Defendant finds that the Defendant has, in fact, violated that condition of his probation.

After considering the alternatives, the Court herewith revokes the probation granted therein, and the previously imposed sentence of five years shall be executed forthwith.

* * *

²The notice of hearing refers to an attached probation violation report; however, that report is not among the exhibits in the instant record.

Q: Now, on this 23rd day of October, 1997 the Court has revoked your probation and sentenced you to the 5 years in this case. Do you understand that?

A [Bilynsky]: Yes, sir, I understand.

(Resp. Ex. D at 2, 7.)

On October 23, 1997, the Circuit Court issued a written judgment, finding that Bilynski had waived the right to a contested hearing and admitted violating Condition #1 as alleged in the probation violation report. In addition, the court accepted Bilynski's waiver, executed the previous sentence of imprisonment, and related that Bilynski had not received ineffective assistance of counsel. (Resp. Ex. C.)

On November 17, 1997, Bilynsky filed in the Circuit Court a pro se motion under Missouri Supreme Court Rule 24.035 a supplemental motion for post-conviction relief. (4:99CV1239ERW Doc. 29 at 2.) After counsel was appointed, an amended Rule 24.035 motion was filed. (Id.) These motions were denied without an evidentiary hearing. (Id. at 3.) Bilynsky appealed the denial of post-conviction relief to the Missouri Court of Appeals, which summarily affirmed the judgment. See Bilynsky v. State, 989 S.W.2d 267, 268 (Mo. Ct. App. 1999) (per curiam).

Bilynsky filed a petition for writ of habeas corpus (which he signed on October 1, 1999) in the Missouri Court of Appeals challenging the revocation of his probation. (Resp. Ex. A.) That petition was denied on November 16, 1999. (Resp. Ex. B.)

In his instant federal habeas corpus petition, which was filed in this court on June 21, 2000,³ Bilynski alleges the following grounds for relief.

³Bilynsky's petition, originally brought in the United States District Court for the Western District of Missouri, was transferred to this court on May 9, 2000. (Doc. 1 Attach.)

1. His guilty plea to violating a conditions of his probation was not knowing and voluntary.
2. The revocation of his probation resulted from his unlawful arrest and extradition from Virginia to Missouri.
3. His attorney rendered ineffective assistance in that she (a) did not investigate the allegations of the probation violation; (b) did not advise him of his rights to a preliminary revocation hearing, to call, confront, and cross-examine witnesses; and (c) advised him to plead guilty to the alleged probation violation based on a crime he did not commit.
4. The Circuit Court plainly erred (a) by revoking his probation for a crime he did not commit and (b) accepting an induced and involuntary admission.
5. The prosecution (a) failed to disclose evidence favorable to the defense, i.e., that he had not committed a sex offense in Virginia; and (b) assured Bilynski that the Circuit Court was also aware, yet did not inform the court.
6. Bilynski was subjected to double jeopardy and ex post facto violations in that (a) a parole office incorrectly deleted a point from his salient factor score, resulting in an extended term of confinement; (b) crimes that he allegedly committed in Virginia were used to enhance his punishment and deny him work release between May 4 and July 30, 1998; and (c) respondent failed to credit him with sixty-nine days.
7. Bilynsky was denied due process in that (a) the probation revocation proceeding, seven months after the alleged probation violation occurred, was not conducted within a reasonable time of the alleged the violation and was not held near the location of the alleged violation; (b) false allegations from a vindictive Virginia prosecutor were used as a basis for the extradition, probation revocation, and incarceration; (c) he was not permitted to call witnesses and to confront and cross-examine adverse witnesses; (d) while on probation he was unlawfully denied bond release; (e) the Missouri Board of Probation and Parole (MBPP) violated its agreement to release him from confinement if he waived extradition and to release him on parole after serving eighteen

months imprisonment on the probation revocation; (f) respondent failed to credit him with sixty-nine days of time served; (g) the MBPP miscalculated a salient factor score, and considered expunged records and false information regarding alleged charges in Virginia; (h) he has been denied parole release repeatedly without being given reasons therefor, despite meeting all necessary criteria; (i) his temporary release and furlough status were unlawfully revoked; and (j) he has been denied meaningful appellate process regarding MBPP and Missouri Department of Corrections (MDOC) decisions.

(Doc. 8 at 7 & Attach.).

Respondent suggests that, because Bilynski filed a petition for a writ of habeas corpus in the Missouri Court of Appeals challenging his probation revocation, he has exhausted his available state remedies for § 2254 purposes, but that Bilynski's due process rights were not violated with respect to the revocation proceeding. (Doc. 14.)

II. DISCUSSION

A. Characterization of the petition

As a preliminary matter, the undersigned notes that, although Bilynsky invokes 28 U.S.C. § 2241, the only vehicle for his attack on his confinement is § 2254, because he is a state inmate. See Harvey v. Horan, 278 F.3d 370, 378 (4th Cir. 2002) (a state inmate's label for his claim cannot be controlling); Crouch v. Norris, 251 F.3d 720, 722-23 (8th Cir. 2001) (state inmates "can only obtain habeas relief through § 2254, no matter how [their] pleadings are styled"); cf. Veneri v. Missouri, 734 F.2d 391, 393 (8th Cir. 1984) (per curiam) (inmate's claim under "42 U.S.C. § 1983," asserting that a preliminary parole revocation hearing violated his rights to due process and equal protection claim, was cognizable exclusively under § 2254).

B. Second or successive § 2254 petitions

Grounds 1 through 5 of the instant petition, and portions of Grounds 6 and 7,⁴ involve facts that occurred (1) prior to the October 23, 1997 parole revocation proceeding, (2) during the October 23 proceeding, and (3) well before May 28, 1999, the date plaintiff signed his previous § 2254 petition, yet Bilynski waited until the year 2000 to commence his action. Although respondent has not raised the issue, those five grounds and portions of Grounds 6 and 7 should be dismissed because they do not "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," and Bilynski has not shown that "the factual predicate for the claim[s] could not have been discovered previously through the exercise of due diligence." See 28 U.S.C. § 2244(b)(2); Cooper v. Johnson, No. 3:01-CV-1022-M, 2001 WL 912378, at *1 (N.D. Tex. July 31, 2001) (noting sua sponte that § 2254 petition was a second or successive one and dismissing accordingly). Thus, Bilynski should have included those five grounds in his original § 2254 petition. See Rule 2(c) of the Rules Governing Habeas Corpus Cases Under Section 2254 (the petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of due diligence should have knowledge").⁵

C. Procedural bar as to Ground 3

Even if § 2244(b)(2) did not preclude the consideration of any of Bilynski's grounds, to qualify for federal habeas corpus relief

⁴Grounds 6(b)-(c) and 7(a)-(d), (f), and (j).

⁵The fact that the instant Grounds 1 through 5 involve the revocation judgment whereas the prior § 2254 petition primarily involved the original sentence does not conflict with the rule that a habeas petition is to be directed to judgments of one court only, as both judgments came from the same court. See Rule 2(d) of the Rules Governing Habeas Corpus Cases Under Section 2254 ("A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court . . .").

under § 2254, he must have first fully exhausted all available state remedies for each ground he presents in federal court. See 28 U.S.C. § 2254(b)(1)(A), (c). Under the doctrine of procedural bar, a federal habeas court will not review a claim that the state courts did not address, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 730, 750 (1991); accord Wemark v. Iowa, 322 F.3d 1018, 1022-23 (8th Cir.), petition for cert. filed, No. 02-11353 (June 11, 2003). The doctrine applies whether the procedural default occurred at trial, on appeal, or on state collateral attack. See Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

When the federal claim is the ineffective assistance of counsel, a habeas petitioner must have properly preserved "both the factual and legal bases" for each separate alleged instance of ineffectiveness. King v. Kemna, 266 F.3d 816, 821 (8th Cir. 2001) (en banc) (internal quotations omitted), cert. denied, 535 U.S. 934 (2002). Bilynski's habeas corpus petition to the Missouri Court of Appeals does not mention ineffective assistance of counsel and Bilynski cannot satisfy the exceptions set forth in Coleman. Hence, an additional basis exists for dismissing Ground 3. See id. at 822 (recognizing its "discretion to consider an issue of procedural default sua sponte").

D. The merits

If it were necessary to address the merits of the grounds other than the ineffective assistance ground, the outcome would not change.

First, the undersigned notes that in Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court held that minimum requirements of due process must be met in a parole revocation hearing. These requirements include (a) written notice of the claimed violation of probation; (b) disclosure to the parolee of the evidence against him;

(c) an opportunity to be heard in public and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer finds good cause for not allowing confrontation); (e) a neutral and detached hearing body, such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finder indicating the evidence relied on and the reason for the revocation of parole. Id. at 489. The Court subsequently extended these requirements to probation revocation hearings. See Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); see also United States v. Zentgraf, 20 F.3d 906, 909 (8th Cir. 1994).

Upon careful review of the record, it is evident that the six Morrissey factors were either satisfied or rendered irrelevant by waiver of the right to a contested revocation proceeding and his testimony. Specifically, he indicated to the Circuit Court that he understood what he was doing when he signed the hearing waiver form, that he had gone over the revocation report, and that he understood his probation was being revoked. See Huston v. Jones, 863 F.2d 30, 31 (8th Cir. 1988) (per curiam) (the plea transcript belied the subsequent claims of involuntariness). Moreover, he was given an ample opportunity by the Circuit Court to raise any issues of voluntariness and coercion, yet nothing of the sort appears in the record. Thus, Ground 1 lacks merit.

Because Bilynski has not provided any valid argument to overcome the fact that he was arrested and returned to Missouri pursuant to a court-issued warrant, Ground 2 fails. In fact, he admits he waived his right to an extradition hearing. (Resp. Ex. A at unnumbered 3.) Grounds 4 and 5, which raise non-jurisdictional arguments, are waived. See United States v. Soriano-Hernandez, 310 F.3d 1099, 1103 (8th Cir. 2002) (a knowingly and understandably made plea of guilty waives all non-jurisdictional defects and defenses and equates with an admission of guilt); United States v. Kempis-Bonola, 287 F.3d 699, 701 (8th Cir.) ("By entering an unconditional guilty plea, a criminal

defendant waives the right to appeal all nonjurisdictional defects."), cert. denied, 123 S. Ct. 295 (2002); Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989) (per curiam).

Finally, the numerous arguments raised in Grounds 6 and 7 do not warrant the granting of Bilynski's petition. Some of these arguments, such as that the proceeding to revoke his Missouri probation did not occur near Virginia, are completely without merit. Other of Bilynski's arguments, such as that the Virginia prosecutor made false allegations, are foreclosed by Bilynski's knowing and voluntary admission of having violated Condition #1 of his probation.

Moreover, Bilynski's arguments concerning defective parole hearings were considered and rejected in the previous § 2254 action. (4:99CV1239ERW Doc. 29 at 23.) See Mo. Rev. Stat. 217.690.1 (the MBPP "may in its discretion" parole an inmate upon belief there is reasonable probability that he can be released without detriment to the community or to himself); Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993) (under Missouri's parole statute, parole is purely discretionary); Maggard v. Wyrick, 800 F.2d 195, 198 (8th Cir. 1986) (the Missouri parole statute "does not create a protected liberty interest in parole"). So too were his arguments regarding not being credited with all of the time served in jail. (Id. at 24.) See Travis v. Lockhart, 925 F.2d 1095, 1097 (8th Cir. 1991) (habeas petition was properly dismissed for failing to allege a constitutional claim where petitioner alleged that the state failed to credit him with presentence jail time purportedly required by state statute). Further, Bilynski's own evidence (Doc. 16 Exs. C, H) contradicts his assertion that he was repeatedly being denied parole release without being given any reasons. Finally, other of Bilynski's arguments are too vague to discern, such as his blanket statement that he has not been provided with effective or meaningful appellate process for MDOC and MBPP decisions.

RECOMMENDATION

For the reasons stated above,

IT IS HEREBY RECOMMENDED that the petition of Christopher Bilynsky for a writ of habeas corpus be denied.

The parties are advised that they have ten (10) days in which to file written objections to this Report and Recommendation. The failure to file timely objections may result in the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of August, 2003.